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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ALLISON DEAS,
Petitioner,

v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE EPILEPSY FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ALEXANDRA K. FINUCANE*
PATRICIA CLEARY RIES
Epilepsy Foundation
National Office
4351 Garden City Drive
Landover, MD 20785
(301) 459-3700
Counsel for *Amicus Curiae*

*Attorney of Record

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22pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* iii

INTEREST OF *AMICUS CURIAE* v

SUMMARY OF ARGUMENT vii

ARGUMENT

I. HISTORICALLY, PEOPLE WITH EPILEPSY OR SEIZURES HAVE SUFFERED DUE TO SOCIETY'S FEARS AND MISUNDERSTANDING, ESPECIALLY IN THE AREA OF EMPLOYMENT 1

II. CONGRESS EXPLICITLY STATED THAT THE PURPOSE OF THE "REGARDED AS" PRONG OF THE ADA IS TO COMBAT THE IRRATIONAL FEARS AND MISPERCEPTIONS OF EMPLOYERS AND OTHERS. 7

A. The Fifth Circuit's decision renders the "regarded as" prong of the ADA meaningless. 10

III. PEOPLE WITH SEIZURES AND OTHER STIGMATIZED CONDITIONS WILL SUFFER IRREPARABLY FROM THE FIFTH CIRCUIT'S DECISION. 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES *Page*

School Bd. Of Nassau County v. Arline, 480 U.S. 273 (1987).....4, 6

STATUTES

29 U.S.C. § 701 *et seq*.....3

42 U.S.C. § 12101 *et seq*. 3

LEGISLATIVE HISTORIES

S. Rep. No. 101-116 (1989).....4, 5

H. Rep. No. 101-485 pt. 2 (1990).....4, 5

H. Rep. No. 101-485 pt. 3 (1990).....4, 5

OTHER AUTHORITIES

Eisenberg, *Sociocultural Perspectives, in Epilepsy: A Comprehensive Textbook* 41 (J. Engel, Jr. et al eds. 1997).....2

Epilepsy Foundation, *Epilepsy: A Report to the Nation* 7 (1999).3, 4

Epilepsy Foundation of America, *How to Recognize & Classify Seizures & Epilepsy* (1992).....2

Gastaut, *Dictionary of Epilepsy*. Part 1: Definitions (1973). 1

Hicks & Hicks, *Attitudes of Major Employers Toward the Employment of People with Epilepsy: A 30-Year Study*. 32(1) Epilepsia, 86-88 (1991). 4

Report of the 1997 National Conference on Public Health and Epilepsy, *Living Well with Epilepsy* 11 (1997). 3

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For The Fifth Circuit

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

The Epilepsy Foundation of America respectfully moves this Court for permission to file the accompanying brief *amicus curiae* in support of Petitioner. Petitioner granted written consent to the filing of this brief.[1] The Respondents have not given their

[1] Petitioner's written consent to the Epilepsy Foundation of America's filing of this brief has been filed with the Clerk of the Court.

consent to the filing of this brief. Leave of this Court is therefore requested under Rule 37.2(b) of this Court.

The interest of *amicus* is set forth below. The accompanying brief addresses issues of importance to people with epilepsy, seizure disorders and other disabilities. *Amicus* has reason to believe that its brief will supplement rather than reiterate the arguments made by Petitioner.

v

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For The Fifth Circuit

BRIEF OF THE EPILEPSY FOUNDATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Epilepsy Foundation of America (also known as the Epilepsy Foundation) is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-

date, accurate information about epilepsy and seizures, promotes public understanding of the disorder, and supports research, professional awareness and advocacy on behalf of people with seizure disorders.

The term "epilepsy" evokes stereotyped images and fears which affect persons with this medical condition in all aspects of life, including, and especially, employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws which protect individuals

from discrimination based on these stereotypes and fears. The Epilepsy Foundation is very concerned about the Fifth Circuit's interpretation of the Americans with Disabilities Act (ADA) and the negative implications this decision, if allowed to stand, will have for people with epilepsy, seizures, and other stigmatic disorders.

SUMMARY OF ARGUMENT

The Epilepsy Foundation respectfully urges this Court to grant the petition for certiorari filed by plaintiff. The ADA and its predecessor statute, the Rehabilitation Act of 1973, as amended, represent a major source of relief for people with disabilities like epilepsy and seizures seeking to become a gainful part of our society. When the ADA was drafted, legislators and advocates like the Epilepsy Foundation recognized that some people may be disabled, not by the limitations of their medical condition, but rather by the attitudes of others. Hence, the development of the "regarded as having a disability" prong of the statute. The Fifth Circuit's decision in this case effectively renders this aspect of the law meaningless for people who have an impairment that may not

actually substantially impair their daily living, and contravenes the intent and the plain language of the Americans with Disabilities Act.

ARGUMENT

I. HISTORICALLY, PEOPLE WITH EPILEPSY OR SEIZURES HAVE SUFFERED DUE TO SOCIETY'S FEARS AND MISUNDERSTANDING, ESPECIALLY IN THE AREA OF EMPLOYMENT.

Epilepsy is defined as chronic seizures.[2] Seizures are sudden, unexpected, uncontrolled episodes of excessive electrical discharges of brain cells, with associated sensory, motor and/or behavioral changes.[3] While most people think of seizures as people falling to the ground, losing consciousness, and convulsing, there are actually twenty different types of seizures. The effects of seizures, depending on seizure type, can range from minimal changes in sensation to loss of consciousness and convulsions. All seizures produce a temporary loss of conscious control of one's actions. In addition, there is usually a short period of recovery following seizures.

The twenty different types of seizures can be classified into two categories: partial seizures (seizures whose onset is limited to a part of one cerebral hemisphere) and generalized seizures (seizures which seem to involve the brain diffusively

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[2] Gastaut, H. Dictionary of Epilepsy. Part 1: Definitions (1973).
[3] Id.

from the outset). People with epilepsy may have more than one seizure type.

Partial seizures are the most common seizure type. This type of seizure activity is divided into those in which consciousness is maintained (simple partial seizures) but sensory and motor control is lost, and those in which consciousness also is impaired or lost (complex partial seizures).

A simple partial seizure implies that the person affected can still interact with the environment but the seizure will impose certain limitations on specific functions, such as speech or movement. A complex partial seizure is characterized by altered consciousness. There will be no loss of muscle tone in either type of seizure; that is, the person will not fall. In general, individuals with complex partial seizures cannot recall the details of the seizure episode, have impaired responsiveness, or cannot interact normally within the environment. During such seizures, an individual frequently manifests automatisms: repetitive complex motor activity that is purposeless, undirected, and inappropriate. Partial seizures may evolve into generalized seizures (secondarily generalized seizures) as the excessive electrical discharge spreads through the brain. Partial seizures, both complex and simple, are

the most difficult type of seizure to recognize. People unfamiliar with this seizure type may think the individual is daydreaming, drunk or on drugs.

The most commonly recognized generalized seizures are tonic clonic seizures (sometimes referred to as grand mal seizures) and absence seizures, also known as petit mal seizures. All generalized seizures are characterized by lapses of awareness. Tonic clonic seizures manifest as complete loss of muscle tone and massive muscle contractions, usually lasting between one and two minutes. Absence seizures produce short periods of blank staring or momentary changes from a normal to a blank facial expression. They characteristically last from ten to twenty seconds at most, and there is no loss of muscle tone. During the seizure, the person becomes completely unaware of the people and things around him, but quickly returns to full consciousness. There is no memory of the occurrence. These seizures happen so quickly that the person, and sometimes other people, may not notice that anything has happened, even though the person suffering the seizure has momentarily lost consciousness. Absence seizures may occur multiple times a day.

Since there are so many different types of seizures, which can stem from a variety of underlying causes (or even no known cause), epilepsy has been more accurately termed "the epilepsies."[4]

Although modern medicine now understands epilepsy to be a medical condition resulting from excessive electrical discharges in the brain, throughout history, the occurrence of seizures was considered to be a frightening and horrible disease, which afflicted both body and soul. People have thought that those with seizures were possessed by demons or were mentally ill.[5] These various beliefs about epilepsy led to horrible treatment of people with seizures, ranging from physical violence to extreme physical isolation such as incarceration in institutions. In fact, people who suffer from epilepsy or seizures were institutionalized until the latter half of this century.[6]

A survey conducted by the Epilepsy Foundation in 1996 showed that people with epilepsy or seizures identified as their primary concern "insufficient public awareness" about their

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[4] Epilepsy Foundation of America, How to Recognize and Classify Seizures & Epilepsy 11 (1992).
[5] Leon Eisenberg, Sociocultural Perspectives, in Epilepsy: A Comprehensive Textbook 41 (1997).

disorder.[7] A recent U. S. Centers for Disease Control conference on public health and epilepsy recommended that stigma and the factors which contribute to it be addressed as a top priority.[8] Some of the factors cited as perpetuating this stigma include a lack of public awareness about seizures and societal misperceptions about epilepsy and seizures. The broad and varied spectrum of disability among people with epilepsy and seizures was cited as another important factor contributing to the lack of public understanding and stigma, since the disorder can affect each individual so differently. Concerns about liability and a general fear of seizures also were identified as breeding the stigma surrounding seizures.[9] As demonstrated by the above data, stigma continues to be a problem for people with seizures.

Fortunately for people with epilepsy or seizures, modern laws such as the Rehabilitation Act of 1973[10] and the Americans with Disabilities Act[11] have endeavored to remedy the vast discrimination against them in all areas of their daily lives. While

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[6] Id.
[7] Report of the 1997 National Conference on Public Health and Epilepsy, Living Well with Epilepsy 11 (1997).
[8] Id. at 12
[9] Id.
[10] 29 U.S.C. §701 *et seq.*

these laws have not eradicated the fear and misunderstanding which persist in many minds, they do provide a remedy for victims of such discrimination.

Perhaps the most dramatic social consequence to the individual of having a diagnosis of a seizure disorder is its effect on obtaining and maintaining employment. Unfortunately, all too often people with epilepsy or seizures are denied employment or not trained for work they could do well and safely because of an unreasonable fear of their seizures. The working community has not welcomed with open arms persons with seizures; concern for safety and the risk of hiring people with seizures is the reason commonly given for not hiring people with seizures. A recent study on the economic costs of epilepsy documents that the indirect costs such as loss of employment and lowered earnings represent more than three quarters of the cost of the condition.[12]

The number of unemployed persons with epilepsy or seizures (among those fully able to work) remains disproportionately high. It is estimated that at least 25% of

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[11] 42 U.S.C. § 12101 *et seq.*

[12] Epilepsy Foundation, Epilepsy: A Report to the Nation 7 (1999).

working-age people with epilepsy or seizures are unemployed.[13] Among those whose seizures are poorly controlled, the unemployment rate is even higher. Sixty-four percent of individuals with epilepsy or seizures indicated in a survey that they were unemployed as a direct result of their seizures.[14] Frequency of seizures and attitudes of employers appear to be the major factors in the high unemployment rate for this population.[15]

II. CONGRESS EXPLICITLY STATED THAT THE PURPOSE OF THE "REGARDED AS" PRONG OF THE ADA IS TO COMBAT THE IRRATIONAL FEARS AND MISPERCEPTIONS OF EMPLOYERS AND OTHERS.

The Americans with Disabilities Act (ADA) was enacted as a comprehensive anti-discrimination statute to further expand the scope of protection offered by the Rehabilitation Act.[16] The legislative history of the ADA clearly indicates that Congress intended the "regarded as" prong of the definition to cover individuals who fall victim to others' fears and misinformation

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[13] Id.
[14] Id.
[15] Id. See also, Hicks, R.A. & Hicks, M.J., Attitudes of Major Employers Toward the Employment of People with Epilepsy: A 30-Year Study. 32(1) Epilepsia, 86-88 (1991).

about their disorder,[17] and is replete with examples of the history of discrimination based upon erroneous information.[18] In fact, this Court's opinion in School Board of Nassau County v. Arline,[19] a Rehabilitation Act case, is cited in the legislative history as support for the "regarded as" test:

> The Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning.[20]

The legislative history is clear that the purpose of the "regarded as" test is to provide an avenue of redress for individuals who suffer from stigmatic conditions which are viewed by others as disabilities, but which do not actually substantially limit a major life activity.[21] Congress intended that any person

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[16] H. Rep. No. 101-485 pt. 2 at 47, 48 (1990). The definition of who is disabled is practically identical to the definition of a "handicapped individual" included in the Rehabilitation Act.

[17] H. Rep. No. 101-485 pt 2 at 53; H. Rep. No. 101-485 pt. 3 at 30 (1990).

[18] S. Rep. No. 101-116 at 23, 24 (1989).

[19] School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

[20] S. Rep. No. 101-116 at 23; H. Rep. No. 101-485 pt. 3 at 30.

[21] H. Rep. 101-485, Pt. 2 at 53. The legislative history states, "For example, severe burn victims . . . are viewed by others as having an impairment which substantially limits some major life activity and are

who is discriminated against due to another's negative attitudes about that person's impairment is covered under this prong of the definition.[22] Congress recognized that some employers may refuse to hire someone because of the their own belief about the disorder:

> . . . if an employer refuses to hire someone because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.[23]

In addition, the House Committee on Judiciary described the purpose of the "regarded as" test as follows:

> . . . if a person is disqualified on the basis of an actual or perceived physical . . . condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test.[24]

Congress recognized that employer attitudes and fears were largely responsible for the exclusion of the disabled from employment opportunities and the legislative history is decisive

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discriminated against on that basis. Such individuals would be covered under the Act under the third prong of the definition."

[22] Id.

[23] S. Rep. No. 101-116 at 24.

that people who are perceived as having stigmatized conditions be assured protection under the ADA.

A. The Fifth Circuit's Decision Renders the "Regarded As" Prong of the ADA Meaningless.

The Fifth Circuit decision, as it now stands, decimates the meaning and purpose of the "regarded as" test. Many people's seizures are well-controlled or they are very minor and brief in duration; thus, they do not consider themselves disabled in any manner. However, these individuals may need the protection of the ADA when their employers learn that they experience seizures. This decision, if allowed to stand, denies people who are perceived as disabled protection under the ADA, in direct contravention of congressional intent.

The Supreme Court recognized in the Arline case the disabling effects of others' perceptions of an impairment, and the need for a factual inquiry in order to protect persons who are "regarded as" disabled.[25] As this Court aptly stated, "Such an inquiry is essential . . . to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to

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[24] H. Rep. No. 101-485 pt. 3 at 30-31.

such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[26] The final determination of Ms. Deas' entitlement to ADA protection can only be made after a factfinder has an opportunity to consider the evidence presented. If the Fifth Circuit's opinion is allowed to stand, it could make it possible for any employer to fire someone based on their fear about the disorder, and then to escape all liability by stating in an affidavit that they did not regard the individual as being substantially impaired by the condition. The law intended decisions about whether an individual with a disability is able to perform the essential requirements of a job to take place after a full fledged factual determination of the particular job requirements and the impact of that individual's particular disability on that job. The fact that an individual was terminated as soon as the employer discovered that he or she had seizures raises a presumption that the employer regarded the individual as having a substantially limiting impairment, and is a material question of fact that requires analysis. Allowing employers to fire people because they have seizures, and avoid liability by later

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[25] Arline at 287.
[26] Id.

statements that the employer did not regard the individual as being substantially impaired flies in the face of common sense. It also circumvents the very factual analysis of the particular job requirements, the ability of the individual, and the perceptions of the employer at the time the adverse decision was made that the ADA intended to occur. Employers cannot be allowed to circumvent the anti-discrimination mandate of the ADA in this fashion, thus slamming the door to claimants who are victimized solely by an employer's ignorance, fear and misunderstanding of their medical condition.

III. PEOPLE WITH SEIZURES AND OTHER STIGMATIZED CONDITIONS WILL SUFFER IRREPARABLY FROM THE FIFTH CIRCUIT'S DECISION.

The Epilepsy Foundation of America urges this Honorable Court to grant certiorari in this case, as its implications for people with seizures extend far beyond the Fifth Circuit. People with seizures, who have long been treated adversely because of their medical condition, will once again have no redress under the Catch-22 created by the lower court's narrow interpretation of the law. Specifically, those whose seizures are well-controlled or whose seizures are minor will not be able to access the ADA's

protection, despite the fact that they didn't get the job or they lost a job because of the same condition. Such individuals, who may not consider themselves disabled, are still entitled to the protection of the ADA because of the treatment they receive from others. The decision of the Fifth Circuit will have the very real effect of perpetuating abusive behavior toward those who look funny, act weird, or fall to the ground and shake. This is not the message intended by the Americans with Disabilities Act.

CONCLUSION

People with epilepsy and seizures want to work. Most of them are fully able to do so, with some accommodation to their condition, and would like the opportunity to be gainfully employed. If such individuals are not given the chance, because an employer is afraid to hire them, or believes without basis in fact that the individual cannot work because of a medical condition, our society has not moved forward as the ADA intended. The beauty of the ADA is that it provides opportunities for the disabled (and those regarded as disabled, or who have a record of a disability) where the door had previously been locked. The decision of the Fifth Circuit is devastating to all such individuals who are regarded as disabled by an employer. We respectfully

request that this Court grant certiorari in this case, and thereby take the first step to ensure that Ms. Deas, and others like her, be given an opportunity to present their cases when discrimination has occurred. Do not let the Fifth Circuit's decision stand as a permanent obstacle to this population which so richly deserves this opportunity.

Respectfully
submitted,

ALEXANDRA K. FINUCANE*
PATRICIA CLEARY RIES
Epilepsy Foundation
National Office
4351 Garden City Drive
Landover, MD 20785
(301) 459-3700

Counsel for Amicus
Curiae

*Attorney of Record

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